That being the object of the amending Ordinance I think that "for a period of three years prior to the 15th day of April, 1948" must mean for a period of three years immediately preceding the 15th day of April, 1948. Counsel for the appellant submitted that the words "if he is *still* in practice" used in sub-paragraph (ii) of paragraph (g) of sub-section (1) support the view that "prior" does not mean immediately preceding. It is to be noted that the word "still" used in this phrase does not refer to the time when the principal Ordinance came into force but to the time when a person in applying for registration has to show that he has practised dentistry "under conditions not detrimental to public health". Now under sub-section (3) of section 5 of the Ordinance the category of persons in paragraph (g) were given until the 1st day of September, 1950 to make applications for registration. As this category of persons were excluded from registration when the principal Ordinance came into force on the 8th April, 1948 they could not lawfully practise dentistry after that date and would normally have ceased to practise dentistry on that date, and at the time they made applications for registration by virtue of the provisions introduced by the amending Ordinance they would not be "still" in practice.

As the appellant had not practised dentistry in any State or Settlement in the Federation for a period of three years immediately preceding the 15th day of April, 1948 he has not the qualifications required by section 5(1)(g) for registration under the Registration of Dentists Ordinance, 1948.

Appeal dismissed.

NG YEE v. PUBLIC PROSECUTOR.

[A. Cr. J. (Mathew, C.J.) May 27, 1953]

[Raub — Criminal Appeal No. 1 of 1953]

Criminal Procedure Code (Cap. 6), s. 399(i) — Admissibility of report of Government Chemist — Irregularity curable under s. 422 of the Criminal Procedure Code.

The appellant was convicted of being in possession of prepared opium contrary to section 9(1)(b) of the Dangerous Drugs Ordinance and was sentenced. Counsel for appellant submitted that the report of the Government Chemist was not served on the appellant 10 days before the trial as required by section 399 of the Criminal Procedure Code, and that this failure on the part of the prosecution rendered the report inadmissible as evidence. Without this evidence, he submitted that there was no evidence to support the conviction.

Held: the admission as evidence of a report by a Government Chemist which was not served on an accused 10 days before the trial as required by section 399 of the Criminal Procedure Code is an irregularity and not an illegality. It can be cured by section 422 of the Code.

[Editorial Note: Attention is drawn to the case of Chong Yik v. Public Prosecutor (1952) M.L.J. 72, where Storr, J. held that proviso to section 399(i) of the Criminal Procedure Code is condition precedent and if not complied with the report of the Government Chemist cannot be admitted. If it is wrongly admitted in evidence, that wrongful admission is an illegality which cannot to cured under section 422 of the Criminal Procedure Code.]

Case referred to:—

(1) *Chong Yik v. Public Prosecutor* (1953) M.L.J. 72.

CRIMINAL APPEAL.

P. P. Nair for the appellant.

J. D. Peterkin (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Mathew, C.J.: — The appellant in this case was convicted of being in possession of prepared opium contrary to section 9(1)(b) of the Dangerous Drugs Ordinance, 1952, and was sentenced to one year's rigorous imprisonment and a fine of $4,000 or 2 years r.i. in default.

Mr. P. P. Nair for the appellant has submitted that the report of the Government Chemist was not served on the appellant 10 days before the trial, as is required by section 399 of the Criminal Procedure Code, and that this failure on the part of the prosecution rendered the report of the Government Chemist inadmissible as evidence. Without this evidence, he submits, that there is no evidence to support the conviction. In support of his submission he has referred to the case of *Chong Yik v. Public Prosecutor*[1]. Section 399(i) reads:—

"Any document purporting to be a report under the hand of any of the persons mentioned in sub-section (ii) of this section upon any person, matter or thing examined or analysed by him on any document purporting to be a report under the hand of the Registrar of Criminals upon any matter or thing relating to finger impressions submitted to him for report may be given in evidence in any enquiry, trial or other proceeding under this Code unless such person or Registrar shall be required to attend as a witness —

(a) by the Court; or

(b) by the accused, in which case the accused shall give notice to the Public Prosecutor not less than three clear days before the commencement of the trial:

Provided always that in any case in which the Public Prosecutor intends to give in evidence any such report he shall deliver a copy thereof to the accused not less than ten clear days before the commencement of the trial."

The report of the Chemist was produced by Inspector Yusoff of the Raub Police and admitted as evidence. The report was admitted wrongly, as the appellant had not been given 10 days notice of its production. It is, I think, clear that the condition

attached to sub-section (i) can be waived. The object of the condition is to enable an accused person to study a report with a view to requiring the person making the report to be called as a witness. In this case there could have been no reason either for the Court or the appellant to require the Chemist to appear as a witness. The appellant's defence was unaffected by this error in procedure. The report was not inadmissible *per se* but only because notice had not been given to the accused. In all the circumstances, I consider that the admission of the report as evidence was an irregularity and not an illegality and can be cured by section 422 of the Criminal Procedure Code. The appeal against conviction is accordingly dismissed.

As regards sentence, Mr. Nair submits that it was wrong for the learned President to conclude that the appellant was acting in concert with others and impose a substantial fine or imprisonment in default. I think the conclusion was justified and, had the learned President imposed a sentence of 3 years imprisonment I could not have said that the sentence was excessive. The appeal against sentence is dismissed.

Appeal dismissed.

GOH TONG v. PUBLIC PROSECUTOR.

[C. A. (Mathew, C.J., Wilson & Taylor, J.J.) November 23, 1953]

[K.L. — Criminal Reference No. 3 of 1953]

Criminal Procedure Code (Cap. 6), ss. 173 and 399 — Commencement of trial for the purpose of.

This was a Reference from the High Court acting in its appellate capacity to the Court of Appeal as to the meaning of the phrase: "commencement of the trial" in section 399. The view of the High Court in this case was at variance with its decision in another case[1] on a similar point.

Held: in section 399 "commencement of the trial" necessarily means commencement of the contentious phase, i.e., of the trial itself. The phrase does not occur in section 173 and for the purposes of that section the trial begins with the framing of the charge which means, in practice, the approval by the Court of this draft charge entered beforehand by the prosecution.

Judgment in **Goh Tong v. Public Prosecutor** (1953) M.L.J. 167 reversed.

Obiter dictum: Where a Judge disagrees with a reported decision, and his judgment may create a direct conflict between the two judgments of the High Court, it will be preferable for the Judge to refer the point to the Court of Appeal with an indication of his reasons for doubting the validity of the authority, rather than to refuse to follow the reported decision.

Case referred to:—

(1) *Public Prosecutor v. Tay Tuan* (1953) M.L.J. 20.

CRIMINAL REFERENCE.

C. S. Jayaswal for the appellant.

P. G. Clough (Federal Counsel) for the respondent.

Cur. Adv. Vult.

Mathew, C.J.: — Section 399(i) of the Criminal Procedure Code enacts that certain technical facts, including the contents of materials alleged to contain opium, may be proved by documentary evidence, provided that a copy of the certificate of the expert is delivered to the accused ten days before the commencement of the trial.

In *Tay Tuan's case*[1], it was held, in a considered judgment on this point alone, that the phrase "commencement of the trial" in section 399 means the commencement of hearing the evidence for the prosecution after the accused has claimed to be tried.

In the case before us, the accused was first brought before the Sessions Court on 6th November, 1952, when the charge was explained to him; apparently he was not then called upon to plead and did not plead. On the 9th of December the accused was formally charged, and claimed trial, and the case was postponed to 30th December for trial. Before that date, other business made it impracticable for this case to be heard, and the Court fixed a later date, namely 24th February, and so informed the parties beforehand.

On the 30th December the accused did not appear, but his counsel was present. On 23rd January 1953 a copy of the certificate was delivered to the accused. On 24th February the case was heard and the accused was convicted. Apart from that certificate there was no evidence whatever that the packets in accused's possession in fact contained opium which was an essential element of the charge. The accused was convicted.

He appealed to the High Court, and it was there argued that since an accused must be brought before the Court on the day following his arrest, and is then charged, section 399 could scarcely ever apply in a Sessions or Magistrate's Court if, for that purpose, the trial commenced with the explaining of the charge. The learned Judge held that a trial commenced with the charging of the accused. He disagreed with the reported decision in *Tay Tuan's case supra*, and quashed the conviction. He added however that his decision had created a direct conflict between two judgments of the High Court, and he referred the question to this Court. In our opinion, it would have